

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT THOMAS ZELINKSI,

Plaintiff-Appellant,

v

JUSTIN KALLO, JOHNATHAN KALLO, DON
A. KALLO, JOHNSON ACHO and JOHN-LIN,
INC., d/b/a NICK'S PARTY STOP,

Defendants-Appellees.

UNPUBLISHED
March 15, 2011

No. 295424
Macomb Circuit Court
LC No. 2009-001738-NO

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

In this personal injury suit, plaintiff appeals as of right the order dismissing plaintiff's complaint against defendants. We affirm.

Plaintiff's first issue on appeal is that the trial court abused its discretion when it ordered plaintiff to post a surety bond in the amount of \$10,000. We disagree. This Court reviews a trial court's decision to require a security bond for an abuse of discretion. *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997). "A trial court's determinations regarding the legitimacy of the claims and a party's financial ability to post a bond are findings of fact that are reviewed only for clear error." *Id.* at 333. A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made, even if there was evidence to support the finding. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Questions of law, including interpretation and application of court rules, are reviewed de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

The Michigan Court Rules allow the defendant in a civil action to bring a motion with the trial court to require the plaintiff to post a bond to cover future costs and expenses. MCR 2.109(A) reads:

On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion.

A security bond should not be required “unless there is a substantial reason for doing so.” *In Re Surety Bond*, 226 Mich App at 331. A “substantial reason” exists when the complaint relies upon a “tenuous legal theory of liability or where there is good reason to believe that a party’s allegations are groundless and unwarranted.” *Id.* at 331-332 (internal quotations omitted).

MCR 2.109(B) provides for an exception. The trial court may allow a party “to proceed *without* furnishing security for costs if *the party’s pleading states a legitimate claim* and the party shows by affidavit that *he or she is financially unable to furnish a security bond.*” MCR 2.109(B) (emphasis added). “The rule attempts to balance the right of a poor plaintiff to seek justice with the need of a defendant to have an opportunity for security.” *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 2713; 463 NW2d 254 (1990), quoting *Gaffier v St John’s Hosp*, 68 Mich App 474, 478; 243 NW2d 20 (1976). This Court further wrote:

In cases where the indigent plaintiff’s pleadings show a tenuous legal theory, the plaintiff’s interest in free access to the courts becomes less significant when weighed against the defendant’s greater need for security. In short, the fulcrum of the rule’s balance is the legitimacy of the indigent plaintiff’s theory of liability. [*Id.*]

Plaintiff argues that the statutory wrongful conduct rule, MCL 600.2955b, was not a substantial reason to require plaintiff to post a bond and did not render his theory of liability illegitimate. We disagree.

The statutory wrongful conduct rule, MCL 600.2955b, reads:

(1) Except as otherwise provided in this section, the court *shall* dismiss with prejudice a plaintiff’s action for an individual’s bodily injury or death and *shall* order the plaintiff to pay each defendant’s costs and actual attorney fees if the bodily injury or death occurred during 1 or more of the following:

(a) The individual’s commission, or flight from the commission, of a felony.

(b) The individual’s acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony. [Emphasis added.]

The commission of a felony is defined as “a conviction for a felony.” MCL 600.2955b(7)(a)(i). MCL 600.2955b(2) provides for an exception to the statutory wrongful conduct rule:

(2) If the bodily injury or death described in subsection (1) resulted from force, the court shall not apply subsection (1) to the claim of the plaintiff against a defendant who caused the individual’s bodily injury or death unless the court finds that the particular defendant did either of the following:

(a) Used a degree of force that *a reasonable person* would believe to have been appropriate to prevent *injury to the defendant or to others*.

(b) Used a degree of force that a reasonable person would believe to have been appropriate to prevent or respond to the commission of a felony. In making a finding under this subsection, the court shall not consider the fact that the defendant may not have known that the plaintiff's actions or attempted actions would be the commission of a felony.

The trial court concluded that plaintiff's claims were barred by the statutory conduct rule. It found that plaintiff's injuries were suffered "while he was attempting to flee from the scene of that armed robbery." The trial court further concluded that defendants' actions were reasonable. The trial court noted that despite plaintiff's allegations in his complaint, the evidence in the record indicates that defendants did not hit plaintiff with a baseball bat. Moreover, the record shows that defendants ceased punching and kicking plaintiff as soon as plaintiff asked them to stop.

The trial court did not clearly err in finding that the statutory wrongful conduct rule undermined the legitimacy of plaintiff's claim. First, the trial court did not clearly err in finding that plaintiff's actions in Nick's Party Stop amounted to armed robbery. "The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). The crime of armed robbery is a felony under Michigan law. MCL 750.529. The record indicates that plaintiff went into Nick's Party Stop with a knife. He proceeded to use the knife to threaten Melody LaCroix and Johnathan Kallo, employees at the store and to have them open the registers and give him the money inside. Plaintiff suffered the injuries for which he claimed damages as he was fleeing the scene following the armed robbery. As a result, the trial court did not clearly err in concluding that the statutory wrongful conduct rule applied because plaintiff suffered injuries during his flight from the commission of acts that constituted armed robbery.

Plaintiff argues that the trial court erred in concluding that he committed an armed robbery because he was not convicted of armed robbery as required by the statute, but pleaded guilty to unarmed robbery. We again disagree. The wrongful conduct statute does not bar recovery only for conduct that resulted in a conviction. MCL 600.2955b(1)(b) also prohibits recovery for "acts or flights from acts that the finder of facts in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony." In this case, the trial court found plaintiff's acts to constitute armed robbery and, as discussed above, it did not clearly err in so concluding.

Second, the trial court did not clearly err in concluding that defendants' actions were reasonable. Plaintiff argues that the amount of force Justin Kallo and Johnathan used against him was not reasonable to prevent injury to themselves or to prevent or respond to the commission of the felony. We disagree. Justin's testimony indicates that he shot at plaintiff when he felt that plaintiff was threatening him or Johnathan with a knife. Justin indicated he only shot the gun two or three times. Moreover, Justin claimed that he and Johnathan punched plaintiff only because plaintiff repeatedly attempted to get away from them. Justin testified that as soon as plaintiff stopped fighting them, he and Johnathan stopped punching plaintiff. Justin denied kicking plaintiff. Justin's testimony was corroborated by the testimony of Joseph Reinhardt, a witness who lived across the street. Reinhardt testified that plaintiff was struggling

with Justin and Johnathan and was kicking them. In contrast, plaintiff stated, in his response to defendants' interrogatories, that he dropped the money and alcohol and surrendered soon after exiting Nick's Party Stop, but that Justin shot him in the back after he dropped the money. Moreover, plaintiff claimed that Justin and Johnathan punched, kicked, and beat plaintiff with the butt of the gun after plaintiff surrendered until the police arrived. Plaintiff's testimony is corroborated by the testimony of Andrew Thomas, who lived across the street and also indicated that Justin and Johnathan were hitting plaintiff with the butt of the gun and were kicking him. Although the issue is close, we are not left with a definite and firm conviction that a mistake was made. Therefore, the trial court did not clearly err in concluding that the amount of force used by defendants was reasonable and as a result plaintiff's claim were not legitimate.

Plaintiff did not address the trial court's consideration of his indigency in his initial brief on appeal with regard to whether the trial court abused its discretion in ordering plaintiff to post bond. As a result, we need not address whether the trial court erred in failing to adequately balance plaintiff's financial ability to pay with the legitimacy of his claims when deciding whether to order bond. We conclude that the trial court did not abuse its discretion when it ordered plaintiff to post a \$10,000 bond. Based on the statutory wrongful conduct rule, there was substantial reason for ordering the furnishing of the bond given the plaintiff's tenuous basis for defendants' liability and the illegitimacy of plaintiff's claims.

Both parties also address the common law wrongful conduct rule. We need not address the common law wrongful conduct rule because we conclude that the statutory wrongful conduct rule was a substantial reason for ordering bond.

Plaintiff's next issue on appeal is that the trial court abused its discretion in dismissing plaintiff's complaint. We disagree. A dismissal of a case for failure to comply with a court order is reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008).

This Court has held that a trial court "may properly dismiss a party's claim when the party does not file a security bond as ordered." *Hall*, 186 Mich App at 273. The trial court must give the party a reasonable opportunity to comply with the order. *Id.* In this case, plaintiff admitted his failure to post bond and does not question the amount of time granted to him to comply with the order. As a result, the trial court did not abuse its discretion in dismissing plaintiff's complaint.

Plaintiff argues that the trial court abused its discretion because it failed to consider the *Woods* factors when determining whether to dismiss plaintiff's complaint. Under *Woods*, the dismissal of a plaintiff's claims based on his failure to comply with court rules or a court order is "a drastic sanction," and in deciding whether to dismiss a claim, a court should consider:

- (1) whether the violation was willful or accidental;
 - (2) the party's history of refusing to comply with previous court orders;
 - (3) the prejudice to the opposing party;
 - (4) whether there exists a history of deliberate delay;
 - (5) the degree of compliance with other parts of the court's orders;
 - (6) attempts to cure the defect;
 - and (7) whether a lesser sanction would better serve the interests of justice.
- [*Woods*, 277 Mich App at 631.]

Despite plaintiff's argument, the trial court held a hearing regarding defendants' motion to dismiss in which it considered many of the factors delineated in *Woods*. In particular, the trial court heard plaintiff's argument regarding the harshness of the penalty and it considered the possibility of other less drastic sanctions. The trial court also deliberated over the reason for plaintiff's inability to post bond, including his term of imprisonment for unarmed robbery. Ultimately, the trial court concluded that it had properly exercised its discretion in ordering plaintiff to post a bond because plaintiff's legal claim was tenuous. The trial court concluded that dismissal was the appropriate remedy. Moreover, the trial court dismissed plaintiff's complaint without prejudice. If plaintiff were able to come up with money to furnish a security bond, he would be able to refile his complaint. As a result, we conclude that the trial court did not abuse its discretion in dismissing plaintiff's complaint.

Plaintiff's next issue on appeal is that MCL 600.2955b is unconstitutional because it denied plaintiff his constitutional right to a jury trial. The constitutionality of a statute presents a question of law which is subject to de novo review. *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004). We need not address this issue because it is not ripe for review. The requirement of ripeness precludes the adjudication of hypothetical or contingent claims. *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580; 105 S Ct 3325; 87 L Ed 2d 409 (1985). In this case, the trial court did not dismiss plaintiff's complaint as a result of the statutory wrongful conduct rule. Instead, the trial court ordered plaintiff to post a security bond to cover the future expenses and costs of a jury trial. The case was dismissed as a result of plaintiff's failure to post the bond, not because his claims were barred under the statutory wrongful conduct rule. As a result, plaintiff's issue, that MCL 600.2955b denied him a right to a jury trial is hypothetical and not ripe for review.

Plaintiff's final issue on appeal is that MCR 2.109 is unconstitutional because it deprived plaintiff of a vested property right in his cause of action. We disagree. An unpreserved claim of constitutional error is reviewed for plain error which affected the outcome of the case. *In re Application of Consumer Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

The Fourteenth Amendment of the United States Constitution and Const 1963, art 1, § 17 both guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." "The Due Process Clause has a substantive component that protects individual's liberty and property interests from arbitrary government actions." *General Motors Corp v Dep't of Treasury*, ___ Mich App ___, ___ NW2d ___ (Docket No. 291947, issued October 28, 2010), slip op, p 7. To be protected by the right to due process, a property interest must be a vested right. *Id.* A vested right is an interest which the government is compelled to recognize and protect of which the holder could not be deprived without injustice; it is more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994). A private cause of action can be a vested property right if it accrues under a statute. *Hurt v Michael's Food Ctr*, 249 Mich App 687, 693; 644 NW2d 387 (2002).

Plaintiff did not have a vested property right in his cause of action. Given the discussion at length above that plaintiff's cause of action was based on an illegitimate theory of liability

because it was likely prohibited by the statutory wrongful conduct rule, plaintiff was not denied a vested property right when the trial court ordered plaintiff to post bond under MCR 2.109 and dismissed the case for failure to post bond under MCR 2.109.

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Karen M. Fort Hood